
(2008) 05 AHC CK 0152
In the Allahabad High Court

Syed Mohd. Sajjad Ali Khan

APPELLANT

Vs

Assistant Survey Commissioner, Waqf (Administrator), The
U.P. Shia Central Board and Syed Mohd. Ahmad Ali Khan

RESPONDENT

Date of Decision : 02-05-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 151
Limitation Act, 1963 — Section 10, 27, 28
Transfer of Property Act, 1882 — Section 41

Citation : (2008) 4 AWC 3294 Supp : (2008) 4 AWC 3294

Hon'ble Judges : Janardan Sahai, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Janardan Sahai, J.—Akbar Ali Khan created a waqf-alal-aulad in respect of certain properties by a deed dated 26.7.1934. By the said deed Akbar Ali Khan appointed himself as the first Mutawalli. He died on 16.12.1958 leaving behind three sons Qasim Ali Khan, Kazim Ali Khan and Raza Ali. On his death the names of these sons was mutated as their bhumidari. Qasim Ali Khan became the Mutawalli after death of Akbar Ali under the terms of the waqf deed. Kazim Ali Khan who was a beneficiary of the waqf executed a sale deed of his 1/3 share on 14.10.1960 in favour of Mohammad Ahmad Ali Khan one of the sons of Raza Ali. Ahmad Ali was also a beneficiary of the waqf. A subsequent sale deed dated 26.9.1974 was executed by the Mutawalli Qasim Ali Khan of his 1/3 share to Ahmad Ali Khan another son of Raza Ali. This sale deed was therefore executed by the Mutawalli in favour of a beneficiary. Qasim Ali Khan was replaced by his son Sujat Ali as a Mutawalli after he had resigned or was removed some time in 1988 or 1990, not very clear. Sajjad Ali the applicant in these revisions is the son of Qasim Ali Khan. On 20.9.1996 Sajjad Ali filed a complaint to the Waqf Board making allegations of mismanagement against Sujat Ali the Mutawalli praying for his removal and seeking his own appointment. He alleged that the waqf property

was in unauthorized occupation of Raza Ali, Mohammad Ahmad Ali and Ahmad Ali and prayed for recovery of the waqf properties. A report dated 15.3.1997 was submitted by the Senior Inspector Waqfs that the waqf was registered as Waqf No. 1456 and that the properties were waqf properties, that Raja Ali Khan got the waqf properties partitioned showing that these were ancestral properties and thereafter got them purchased in the names of his sons. It was said that the sale deeds were obtained without permission of the court or of the waqf Board and were therefore invalid. Dr. Nasim Zaidi the Controller purporting to exercise powers of the Waqf Board passed two orders dated 16.7.1997 and 12.8.1997 u/s 52 of the Waqf Act, 1995, which had come into force with effect from 1.1.1996 holding the two transfers to be illegal for want of permission and issued a requisition to the Collector to recover the waqf properties. The Collector passed an order dated 31.12.1997 u/s 52(2) of the Act directing the respondents in possession to deliver possession of the property to the Board. This order of the Collector was challenged by the respondents Ahmad Ali and Mohd. Ali in two separate appeals No. 2 of 2002 and 3 of 2002 u/s 52(4) of the Act, which were allowed and the order of the Collector u/s 52(2) of the Waqf Act, 1995 was set aside. Sajjad Ali Khan has challenged the orders passed by the tribunal in these two revisions.

2. I have heard Sri W.H. Khan; learned Senior Advocate for the applicant and Sri M.A. Qadeer, learner senior Advocate for the respondents and Smt. Tulika Prakash for the Waqf Board who adopted the arguments of Sri W.H. Khan.

Long after the execution of the waqf deed a sale deed was executed in 1948 by Akbar Ali Khan of a tube-well and some adjoining land, which was part of the waqf property. Qasim Ali Khan son of Akbar Ali Khan filed Original Suit No. 1 of 1950 challenging the sale deed. The trial court decreed the suit. First Appeal No. 139 of 1951 filed by Akbar Ali Khan was dismissed by this Court by judgment and decree dated 11.7.1962. One of the issues framed in the suit was whether the waqf being a Shia had reserved any interest for himself in the waqf property and if so is the waqf void and invalid for this reason. It was held by this Court in the appeal that Raja Akbar Ali Khan had created a valid and effective waqf and that all the legal requirements in respect of the creation of the waqf by a Shia under the Mohammadan Law have been made out. It was also found that after the waqf was created the possession of Akbar Ali Khan was as Mutawalli. The tribunal has held that the judgment of Original Suit No. 421 of 1959 does not operate as res judicata because the respondents Ahmad Ali and Mohd. Ali were not parties in that suit and secondly the property involved in that suit was different from the one, which is the subject matter of the present dispute. Sri W.H. Khan, learned senior Advocate for the applicant submitted that what has to be seen for deciding the issue of res judicata is whether there was identity of title between the parties. The submission has merit. In Raj Lakshmi Dasi and Others Vs. Banamali Sen and Others, the principle was recognized and it was held that test of res judicata is the identity of title in the two litigations and not the identity of the actual property involved in the two cases. Ahmad Ali Khan and Mohd. Ahmad Ali

Khan are sons of Raza Ali son of Raja Akbar Ali Khan. They claim title over the properties on the basis of inheritance from Akbar Ali Khan. The decree in Original Suit No. 1 of 1950 against Akbar Ali Khan is therefore binding upon them. On the other point too that the properties involved in the present dispute are different from that, which was involved in the aforesaid suit also the tribunal has committed an error. The finding (sic) recorded by this Court in the first appeal aforesaid was that the waqf in question is a valid waqf. This finding operates as res judicata. It is not in dispute in the present case that the properties in which Kazim Ali Khan and Qasim Ali Khan had sold their shares are covered by the waqf deed. The view taken by the tribunal that for the aforesaid two reasons the judgment and decree of Original Suit No. 1 of 1950 does not operate as res judicata is erroneous. The third reason given by the tribunal for the non-applicability of res judicata which is a reason it equally untenable is the decision of the consolidation court to which we shall now advert.

3. It appears that on the death of Akbar Ali Khan in the year 1958 the names of his three sons were mutated. Original Suit No. 421 of 1959 was filed by Qasim Ali Khan for declaration that the property is a waqf. The suit was however abated on account of commencement of consolidation proceedings in the village. An objection was filed by Qasim Ali Khan for expunging the names of the sons of Akbar Ali Khan on the basis that the properties were waqf. The Consolidation Officer by order dated 24.11.1967 allowed the objections and directed that the entry of waqf be made in the revenue record. It was held by the Consolidation Officer that on the creation of the waqf the property stood transferred to God Almighty and the transfer by Kazim Ali Khan in favour of Ahmad Ali Khan was invalid. The appeal against the order was dismissed by the Settlement Officer Consolidation. The Deputy Director Consolidation also dismissed the revision filed by Kazim Ali Khan and Raza Ali by orders dated 29.1.1969. It was held that the properties were waqf properties. The case of the applicants is that a restoration application was filed against the order of the Deputy Director Consolidation, which was dismissed on 2.3.1972 and thereafter another restoration application was filed in which a compromise was entered into collusively amongst Qasim Ali Khan, Kazim Ali Khan and Raza Ali to the effect that the waqf was a paper transaction and was never acted upon and that the bhumidars (sic) of the plots in dispute are Qasim Ali Khan, Raja Ali Khan and Mohammad Ahmad Ali Khan vendee each having a 1/3 share. The Deputy Director Consolidation by order dated 12.9.1974 decided the revision on the basis of the compromise. It was submitted by the applicants' counsel that the order of the Deputy Director Consolidation dated 29.1.1969 had become final and could not have been affected by the compromise in the second restoration application and that the Deputy Director Consolidation had no power to review his order. The tribunal has however recorded a finding that the order dated 29.1.1969 was an ex parte one, and that the restoration application was dismissed in default and thereafter the second restoration application for setting aside the order dismissing in default the previous restoration application as well as for setting aside the order dated

29.1.1969 of the Deputy Director Consolidation was allowed and the revision had been restored and the compromise was entered into not in the restoration application but in the revision itself. This is a finding of fact and there is nothing to show that the statement of fact contained in the order of the tribunal is incorrect. The tribunal has also found that Sujat Ali Khan who was appointed as Mutawalli after Qasim Ali Khan, had filed a writ petition against the order passed on compromise by the Deputy Director Consolidation but the writ petition was dismissed as withdrawn. The tribunal has therefore held that the order of the Deputy Director Consolidation in the revision on the basis of the compromise has become final and all challenge to it is barred u/s 49 of the U.P. Consolidation of Holdings Act.

4. Sri W.H. Khan, learned senior Advocate for the applicants however submitted that the compromise was a collusive one and the sons of Akbar Ali Khan could not defeat the waqf by a fraudulent compromise. There appears to be merit in this contention. In *State of Punjab (Now Haryana) and Others Vs. Amar Singh and Another*, it was held by the Apex Court that a compromise against public policy or prescription of a statute can be impeached. In *Sunni Central Board of Waqfs and Anr. v. Devi Charan and Ors.* 1995 (2) AWC 1147 it was held that once a waqf property always waqf property and the transferee of the waqf property cannot claim benefit of Section 41 of the Transfer of Property Act. In *Chhedi Lal Misra (Dead) through LRs. Vs. Civil Judge, Lucknow and Others*, a waqf was created by one Mirza Mohammad Haider and after its registration the waqf filed a suit against the Mutawalli which was decreed in terms of a compromise. Thereafter the waqf and his son the Mutawalli executed a transfer deed in respect of waqf property. The waqf Board requested the Deputy Commissioner to issue notice to the transferrer to hand over possession. The transferrer appealed. The Civil Judge dismissed the appeal holding the compromise decree was not binding on the Board as it was not a party in the suit. The High Court dismissed the writ petition. The Apex Court observed that the suit was a collusive one decreed on the basis of compromise. The decision of the High Court and that of the Civil Judge that the compromise was not binding was upheld. In *A.V. Papayya Sastry and Others Vs. Government of A.P. and Others*, it was held that fraud vitiates all the proceedings. In *Karbalai Begum v. Mohd. Sayeed* AIR 1981 SC 71 the Apex Court held in a case where cousins of a widowed co-sharer were in possession that the cousins were in possession as constructive trustees and they could not claim the rights by adverse possession, which would be a fraud. The compromise in the present case is also invalid as the consent of the parties to convert the waqf property into secular (sic) would be a fraud played upon the court and the compromise order of the consolidation court can therefore be ignored. Moreover, the Waqf Board, which is a necessary party in all disputes relating to waqf property was not impleaded as a party before the Deputy Director Consolidation. Section 69 of the U.P. Muslim Waqf Act, 1960 reads as follows;

69. Bar to compromise of suits by or against Mutawallies - No suit or proceeding

pending in any court by or against Mutawalli of a waqf relating to title to waqf property or the rights of the Mutawalli shall be compromised without the sanction of the Board.

In the absence of the Waqf Board the order passed by the Deputy Director Consolidation on the basis of the compromise was invalid in view of Section 69 of the U.P. Muslim Waqf Act, 1960.

5. The tribunal has found that after the death of Akbar Ali Khan his three sons had entered into possession and their possession was admitted to the applicants and the respondents had acquired title by adverse possession. If the order dated 1974 passed by the Deputy Director Consolidation on the basis of the compromise is treated as correct no question of adverse possession would arise as the parties would continue in possession on the basis of the rights, which had been upheld by the consolidation court. In that case the Board could not have evicted, the respondents who would be having a valid title. On the other hand if the contention of the applicant that the sale deed and compromise order of the consolidation court was void, which has found favour with me is accepted the respondents would acquire title by adverse possession even from the date of the order of the Deputy Director Consolidation (sic) the earlier period as litigation had begun. The names of the three sons of Akbar Ali Khan had been mutated on his death. Thereafter the names of the transferee Mohammad Ahmad Ali was also mutated. In the compromise it was admitted that the names of Qasim Ali, Raza Ali and of Mohammad Ahmad Ali the transferee who were the bhumidars would continue. The case of Karbalai Begum (supra) would not be applicable in this case to negative the claim for adverse possession in view of the fact that the transferee was not a co-sharer. The consolidation courts had rather found that the transfer deed of the waqf property was void. It has been found as a fact by the tribunal that the respondents continued in possession throughout. The complaint was filed by the applicants in the year 1996 and the order was passed by the Controller in the year 1997 and the respondents had matured rights by adverse possession long before the complaint was filed even if it were to commence after the order of the Deputy Director Consolidation, the finding of the consolidation courts being that the transfer was void. Moreover, the sale deed executed by Kazim Ali Khan in the year 1960 was by a beneficiary who had no right to sell the waqf property. The sale deed was void. The Deputy Director Consolidation by his order dated 29.1.1969 has affirmed the finding that the sale deed was invalid. The sale deed executed by Qasim Ali Khan on 26.9.1974 was not the subject matter of the decision of the consolidation courts as it was executed after the compromise order dated 12.9.1974 of the Deputy Director Consolidation but was also invalid for the reason that no permission of the Waqf Board required to be taken u/s 49-A of the U.P. Muslim Waqf Act, 1960 was ever taken. Clause 11 of the waqf deed also debars the Mutawalli from the sale of waqf property. The contention of Sri W.H. Khan that the property, which was transferred was waqf property having been accepted and the order of the Deputy Director Consolidation of 1969 holding it to be so having been found to have

become final the sale deed dated 26.9.1974 even though it was by Qasim Ali the Mutawalli required the previous sanction of the Waqf Board u/s 49-A of the U.P. Muslim Waqf Act.1960. No such sanction having been obtained the sale deed was void and the transferee Mohd. Ahmad Khan was in adverse possession from the date of the sale deed itself. He had therefore matured his rights by adverse possession.

Both Mohammad Ali Khan and Mohammad Ahmad Ali Khan sons of Raza Ali who were the transferees under the two sale deeds were beneficiaries in the Waqf-alal-aulad. It was submitted by Sri W.H. Khan that a beneficiary cannot acquire title by adverse possession over the waqf property. However, he did not support his submission by any reasons nor were any decisions cited by him in support of his contention. The question has therefore to be examined on first principles. Broadly speaking there are under the Muslim law waqfs of two kinds, public waqfs and private waqfs. A waqf-alal-aulad is a private waqf. There are decided cases upon the point that persons can acquire title by adverse possession over the property of a waqf. In *Mosque known as AIR 1940 116 (Privy Council)* it was held that the title upon waqf property could be prescribed by adverse possession. In that case the Sikh Mahants of Gurdwara were found to have acquired title by adverse possession over a mosque. In *Dr M. Ismail Frauqui and Others Vs. Union of India (UOI) and Others*, it was held that title by adverse possession could be acquired over a mosque. In *waqf Khudawantala v. Saifuddin 1982 A.L.J. 686* it was held that title by adverse possession which in that case was being claimed by Muslims could be acquired over a grave yard. Even a Muslim who has a right to worship in a mosque or who has a right to bury his dead in a grave yard is a beneficiary but he can acquire title by adverse possession over a mosque or a grave yard. Two principles are however well established one that a person in fiduciary relationship or one in whom the property has vested in trust cannot claim title by adverse possession over trust property. This is not only the rule in respect of other trusts but is also recognized in respect of waqfs under Muslim law, It is on this principle that a Mutawalli cannot claim title by adverse possession over the *Mohammad Shah Vs. Fasihuddin Ansari and Others*, But a beneficiary has no fiduciary relationship in the waqf. Although Muslim waqfs are not governed by the provisions of the Indian Trusts Act the rule that a person in fiduciary relationship, cannot acquire title by adverse possession over trust properties is well recognized in law. The other principle equally well settled is that a co-sharer of property cannot acquire title by adverse possession over the share of another co-sharer in the absence of ouster. It is, therefore, necessary to examine the status of a beneficiary over the property in his possession in a waqf-alal-aulad and to see whether it vests in him in trust. A waqf has been defined as a permanent dedication to an object recognized by Muslim law as religious, pious or charitable. It is well settled that as soon as the property is dedicated the waqif divests himself of all proprietary interest, which immediately vests in God. In a waqf-alal-aulad governed by Shia law there was a doubt prevailing at one time whether the proprietary interest vests in the beneficiary or in God. No period of

limitation for following property vested in a person in trust has been prescribed- vide Section 10 of Limitation Act.

6. In AIR 1948 301 (Oudh) it was held that in a Shia waqf-alal-aulad the property vests in the beneficiary. In Moattar Raza and Others Vs. Joint Director of Consolidation, U.P. Camp at Bareilly and Others, which was a case of a Shia Waqf-alal-aulad a Full Bench of this Court considered the various decisions of the Judicial Committee and also the decision of the apex court in Thakur Mohd. Ismail Vs. Thakur Sabir Ali, and held that even in a waqf-alal-aulad the property stands transferred to God Almighty. In para 20 of the Report the Full Bench noticed the difficulty in taking the view that in a awaqf-alal-aulad the property vests in the Mutawalli or the beneficiary. The learned judges observed in paras 20 and 21 as follows;

20. Obvious difficulties are bound to arise if it is held that in case of waqf-alal-aulad the proprietary right or ownership in the waqf property vests in the Mutwallis or the beneficiaries. If such a vesting takes place, then it will legally create a heritable and transferable estate in the hands of the persons in whom the title has vested and once such vesting takes place, there cannot be any divesting of such proprietary title, so as to ultimately vest the property in God. Indeed, there may be nothing left out of the corpus of the waqf property to be vested in God at all, when the occasion arises on the failure of the line of succession of the descendants of the waqif. If any property is still left when the line of descendants or beneficiaries becomes extinct, the rule of bona vacantia will operate as so to vest the property in the State. The permanency of the dedication which is basically the fundamental principle involved in a waqf cannot exist or be ensured, if it is held that the proprietary title does not vest in God from the very inception of the creation of the waqf but vests in the Mutawallis or beneficiaries for the time being.

21. From what has been stated above, it necessarily follows that in every case of a waqf, whether public, or private, the waqf property vests in God Almighty or in the waqf itself as an institution or a foundation eo nomine and not in the Mutawalli or the beneficiary.

A beneficiary is therefore not a co-owner and therefore the principle that a co-owner cannot acquire right by adverse possession over the share of another co-owner is not applicable to a beneficiary. Nor does a beneficiary hold the property in trust. The decisions Mahendra Kumar and Ors. v. Deputy Director Consolidation 1968 A.L.T. 460 and Mohammad Ahmad v. Allah Rabbul Alemin 1984 A.W.C. 939 are in respect of co-sharer's rights, nature of possession and right of a karta joint family to alienate and these decisions do not apply. As a beneficiary has no fiduciary relationship in the waqf it appears that there is no bar in his acquiring title by adverse possession.

7. In this case two transfer deeds have been impeached. One is a sale deed executed by Kazim Ali Khan of the year 1960 in favour of Mohammad Ahmad Ali

Khan son of Raza Ali Khan. The second is a sale deed of 1974 executed by the Mutawalli Qasim Ali Khan in favour of Syed Mohd. Ali Khan. It was submitted by Sri W.H. Khan that Article 96 of the Limitation Act would apply in this case and that neither the complaint nor the requisition by the Waqf Board was barred by time. Article 96 of the Limitation Act reads as under:

Description of suit. Period of limitation. Time form which period begins to run.
----- 96.

By the manager of a Twelve years. The date of death, resignation Hindu, Muslim or Buddhist; or removal of the transferor religious or charitable or the date of appointment of. endowment to recover the plaintiff as manager of possession of movable or the endowment, whichever is immovable property later. comprised in the endowment which has been transferred by a previous manager for a valuable consideration.

8. Under this Article the Manager of the religious charitable endowment can seek setting aside of a transfer made by a previous manager. Undisputedly the sale deed of 1960 was executed by Kazim Ali khan who was not the Mutawalli/ Manager and, therefore, the question of Article 96 of the Limitation Act 1963 applying in respect of that transfer does not arise. The second sale deed of 1974 was executed by the Mutawalli and therefore, the question as to whether limitation would be governed by Article 96 of the Limitation Act has to be considered in respect of this transfer alone. The contention of Sri M.A. Qadeer, learned senior Counsel for the respondents is that the limitation in this case is governed by Article 65 and not by Article 96. Article 65 of the Limitation Act, 1963 is as follows;

Description of suit. Period of limitation. Time form which period begins to run.
----- 65.

For possession of Twelve years When the possession of the immovable property or any defendant becomes adverse interest therein based on title. to the plaitniff.

Explanation. - For the purposes of this article-

(a) where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession;

(b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies;

(c) where the suit is by a purchaser at a sale in (execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser

shall be deemed to be a representative of the judgment-debtor who was out of possession.

9. It is to be noted that Sajjad Ali who had filed the complaint upon which the proceedings commenced was not a Mutawalli on the date he had filed the complaint. He was subsequently appointed as a Mutawalli by the Waqf Board. It is also to be noted in this case that the order for requisition was passed by the controller performing the functions of the Waqf Board. Although the Waqf Board is not the Manager of waqf properties in the strict sense of the term but it had u/s 19 of the U.P. Muslim Waqf Act, 1960 and has u/s 32 of the Waqf Act, 1995 the power of general superintendence over waqfs, the power to take measures for recovery of lost properties of the waqf and the right to institute and defend suits relating to waqf property. In the broad sense of the term the waqf Board is covered within the meaning of the word Manager under Article 96 of the Limitation Act.

10. The question that then arises is to demarcate the field covered by Articles 65 and 96. If a broad interpretation is given to Article 96 and it is made applicable to a challenge to any transfer by a previous manager for valuable consideration irrespective of the void or voidable nature of the transaction a suit by a new manager for recovery of waqf property would hardly ever be barred by limitation. It the appointment of every new manager marks the starting point of a fresh period of limitation a suit which had become barred by limitation may well get a revival of limitation with the appointment of a new manager. The difficulty of applying Article 96 would arise in the case of void transfers. As for instance where a transfer is void on account of breach of a statutory requirement of obtaining previous permission of an authority adverse possession of the transferee would commence from the date of the transfer. If a suit for recovery of possession is not instituted within the prescribed period of limitation, namely, 12 years Article 65 would come into operation and a suit for recovery of possession on the basis of title would become time barred and the rights of the manager to recover the endowed property would be extinguished in view of the provisions of Section 27 of the Indian Limitation Act. Section 27 of the Limitation Act, 1963 reads as follows;-

27. Extinguishment of right to property.- At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

In Mosque known as AIR 1940 116 (Privy Council) the Privy Council held: The property now in question having been possessed by Sikhs adversely to the waqf and to all interest thereunder for more than 12 years, the right of the mutawalli to possession for the purposes of the waqf came to an end under Article 144, Limitation Act, and the title derived under the dedication from the settler or waqif became extinct u/s 28. The property was no longer for any of the purposes of British Indian Courts, "a property of God by the advantage of it resulting to his

creatures."

11. The proper interpretation to put upon Article 96 is to confine its applicability to suits to recover possession where the right to recover possession has already not been lost u/s 27 of the Limitation Act. In other words Article 96 would be applicable to voidable transfers. The question as to when Article 65 and when Article 96 would apply was considered in *Chintamani Sahoo (deceased by LR.) and Others Vs. Commissioner of Orissa Hindu Religious Endowments and Others*, It was held that if the transfer is void abinitio adverse possession would commence from the date of the transfer itself and limitation would be governed by Article 65. In the case of voidable transfer however limitation would not commence to run from the date of the transfer itself and Article 96 would apply. In the Orissa case the Mahanth of the Math had executed three permanent lease deeds during the years 1943 and 1944 in favour of the plaintiff without the sanction of the Commissioner of endowment, which was necessary u/s 58 of the Orissa Hindu Religious Endowment Act, 1939. The Mahanth who had executed the leases was dismissed in the year 1965. In 1967 the Executive Officer of the Math appointed by the Commissioner of Endowment instituted proceedings for recovery of possession. Under the Hindu Law a permanent lease executed by the Mahanth is operative till the life time of the Mahanth or until his removal. If the limitation would run from the date of the dismissal of the Mahanth, which was made in the year 1965 the proceedings were within time. If on the other hand the adverse possession of the plaintiff was to run from the date of the lease deeds, which were executed in the years 1943-1944 the suit was hopelessly time barred. It was held that as the permanent leases had been executed without sanction of the Commissioner of Endowment, which was a necessary requirement u/s 58 of the Orissa Hindu Religious Endowment Act, 1939 the leases were void and limitation would run from the date of the transfer as the possession of the transferee became adverse from the date of the transfer itself. The court held that the transfer was void and as such Article 65 of the Limitation Act would apply. In the present case both the transfers were void and as such the limitation was governed by Article 65 of the Limitation Act. The finding of the tribunal that the transferees respondents had acquired rights by adverse possession, therefore, does not suffer from any infirmity. Sri W.H. Khan relied upon Section 66-G introduced in the Waqf Act, 1954 by Act 69 of 1984, which provides a period of 30 years limitation for possession of immovable property of the waqf. In respect of this contention it is sufficient to say that the Waqf Act, 1954 was never made applicable to Uttar Pradesh and therefore the period of limitation provided under it would not apply. It was also contended that there is no period of limitation for recovery of waqf property under the Waqf Act, 1995. Reliance is placed upon Section 107 of the Waqf Act 1995 which excludes the application of the Limitation Act. In my opinion the contention does not have merit. The rights of the respondents having matured by adverse possession before the waqf Act 1995 was passed the property had ceased to be waqf property and no question of recovering it by applying Section 107 of the Waqf Act arises. Sri W.H. Khan

relied upon the decision of the apex court in Chhedi Lal Misra (Dead) through LRs. Vs. Civil Judge, Lucknow and Others, The apex court held "The law is well settled that once a waqf is created it continues to retain such character which cannot be extinguished by any act of the Mtawalli or anyone claiming through him." This case has been considered in another context in an earlier portion of this judgment. The case however does not help the applicants on the question of adverse possession for that plea does not appear to have been taken in that case. Moreover, the observations in the case quoted above apply to a person claiming through a Mutawalli. Surely a person whose sale deed is void and is in adverse possession does not claim through the Mutawalli. If however the observations are interpreted to mean that there can be no adverse possession against a waqf, the decision in the case which was rendered by a bench of two judges would be directly in conflict with the decision of the Constitution Bench in Ismail Faruqui's case which has approved the decision of the Judicial Committee in 1940 PC 116 that adverse possession can be acquired over waqf property.

12. The tribunal has recorded a finding that Dr. Nasim Zaidi the Controller who passed the order u/s 52 of the Waqf Act, 1995 did not have jurisdiction to do so as he was not functioning as the Waqf Board. It was also submitted by Sri W.H. Khan that the appointment of the controller Dr. Nasim Zaidi was continuing on the date when the requisition order was passed. It was submitted by Sri W.H. Khan, learned senior Advocate that the finding of the tribunal is erroneous and that the question has already been decided at an earlier stage of this litigation and that finding has attained finality. It appears that against the order passed by the controller directing the eviction of the respondents an appeal was filed which was allowed by the II Additional District Judge acting as the tribunal u/s 83 of the Waqf Act. The order in appeal was challenged by the respondent Syed Mohd. Ali khan in Writ Petition No. 23414 of 1998 and one of the questions involved was whether the Waqf Board, which was constituted under the U.P. Muslim Waqf Act 1960 was continuing on the date the requisition order was passed by the controller. The contention of the respondents is noted by the court in the following words;

In the alternative the learned Counsel for the respondents submitted that if it is accepted that no validly constituted tribunal was in existence during the relevant period, then, even the Board was not constituted by the State Government prior to 17 February 1999 and thereafter no action could have been taken by the authorities seeking dispossession of the contesting respondents. According to him if appellate order of the tribunal is bad for want of jurisdiction being not validly constituted, then the requisition order also goes as it has not been passed on the requisition/complaint of the Board. The learned Counsel for the respondents further submitted that this court should not grant any relief, which may have effect of restoring an illegal order and has relied upon the decision in the case of Brijendra Prakash and Anr. v. the IV Additional District Judge, Etawah and Ors. reported in 1985 A.W.C. 404.

13. It was contended that the U.P. Muslim Waqf Act 1960 had been repealed by the Waqf Act of 1995, which came into force with effect from 1.1.1996 and the Waqf Board constituted under the repealed Act had ceased to exist, there being no notification of constitution of any Waqf Board under the 1995 Act. This court repelled the contention and relied upon Section 112(3) of the Waqf Act and held that the old Waqf Board constituted under the 1960 Act continued till the constitution of the Waqf Board under the 1995 Act. This court held;

Further Siya Central Boards have been constituted u/s 12 of the U.P. Muslim Waqf Act, 1960. The notification issued under the U.P. Muslim Waqf Act, 1960 was superseded by the State government vide notification No. M-4/LII-2-99-2 (50)-98 dated 17.2.1999 and a new board was constituted. In view of the provisions of Section 112(3) of the 1995 Act, the earlier Board constituted by the State government under the provisions of the U.P. Muslim Waqf Act, 1960 continued till it was superseded and a new board was constituted vide notification dated 17.2.1999. Thus it cannot be said that the requisition was not made on a complaint made on behalf of the Board....

Since, it has been held that the Board constituted under the provisions of U.P. Muslim Waqf Act, 1960 continue to remain valid till it is superseded by the State Government and a new Board is constituted under the 1995 Act, the submission that if the impugned order of the Tribunal is set aside as being without jurisdiction, this court would be restoring an illegal order passed by the Board which according to the contesting respondents, has not yet been constituted, has no merit.

14. A similar question also came up for consideration in Civil Misc. Writ Petition No. 31182 of 2003 (U.P. Sunni Central Waqf Board, Lucknow v. State of U.P. and Ors.) decided on 14.7.2006. In that case an order dated 23.6.1992 was passed by the Controller, U.P. Sunni Central Waqf Board, Lucknow directing the Collector Shahjahanpur to evict the third respondent in that case from the land in dispute and in pursuance thereof notice was issued by the Collector. The order dated 23.6.1992 was challenged in Appeal No. 61 of 1992 by the respondent Harsh Dev Gupta. The Additional District Judge, Shahjahanpur by an order dated 16.5.2000 allowed the appeal of Harsh Dev Gupta. Against that order an application was filed u/s 151 CPC by the U.P. Sunni Central Waqf Board, Lucknow for recalling the order. The application of the Waqf Board was rejected by an order dated 29.4.2003 of the Additional District Judge, Shahjahanpur. This order was challenged in writ petition. One of the contentions of the Waqf Board was that the appeal filed by Harsh Dev Gupta was against an order u/s 49-B(5) of the U.P. Muslim Waqf Act, 1960 and the said Act was repealed by the Waqf Act, 1995 and hence the order dated 26.5.2000 passed by the Additional District Judge in the appeal was without jurisdiction. This court considered the provisions of Section 112(3) of the Waqf Act, 1995 as follows:

The argument of learned Counsel for the petitioner that since U.P. Sunni Waqf Act, 1960 has been repealed and under the new Act u/s 52(4) appeal was

provided before the Tribunal and u/s 54(4) of the Act against the order of the Chief Executive Officer, suit could be filed and thus, appeal decided by the additional District Judge after the commencement of Waqf Act, 1995 was without jurisdiction, has no force. In the instant cases, there was a simultaneous repeal and the re-enactment of the Act and Waqf Act, 1995 clearly saves the earlier provisions in toto. Section 112 of the Waqf Act, 1995 reads as follows:

112 - Repeal and savings - (1) The Waqf Act, 1954 (20 of 1954) and the Waqf (Amendment) Act, 1984 (69 of 1984) are hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said acts shall be deemed to have been done or taken under the corresponding provisions of this Act.

(3) If, immediately before the commencement of this Act, in any State, there is in force in that State, any law which corresponds to this Act, that corresponding law shall stand repealed.

Provided that such appeal shall not affect the previous operation of that corresponding law, and subject thereto, anything done or any action taken in the exercise of any power conferred by or under the corresponding law shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act was in force on the day on which such things were done or action was taken.

15. A similar situation arose before the Hon''ble Apex Court in the case of Gammon India Ltd. Vs. Spl. Chief Secretary and Others,

In that case, Andhra Pradesh General Sales Tax Act, 1957 was repealed by Andhra Pradesh Value Added Act, 2005. However, Section 80 of the Andhra Pradesh Value Added Tax Act, 2005 clearly saves the earlier provisions. Saving Clause was identical to Section 112 of Waqf Act, 1995. Apex Court held as follows;

In the instant cases, there is a simultaneous repeal and the re-enactment and the A.P. VAT Act clearly saves the earlier provisions in toto. Consequently, rights and liabilities accrued or incurred under the A.P. GST Act shall continue even after it is repealed.

16. On critical analysis and scrutiny of all relevant cases and opinions of learned authors, the conclusion becomes inescapable that whenever there is a repeal of an enactment and simultaneous re-enactment, the re-enactment is to be considered as reaffirmation of the old law and provisions of the repealed Act, which are thus re-enacted continue in force uninterruptedly unless the re-enacted enactment manifests an intention incompatible with or contrary to the provisions of the repealed Act. Such incompatibility will have to be ascertained from a consideration of the relevant provisions of there-enacted enactment and the mere absence of the saving Clause is, by itself, not material for consideration of all the relevant provisions of the new enactment. In other words, a clear

legislative intention of there-enacted enactment has to be inferred and gathered whether it intended to preserve all the rights and liabilities of a repealed statute intact or modify or to obliterate them altogether.

On the touchstone of the principles of law culled out from the judgment of various courts applied to the facts of these cases lead to a definite conclusion that the Assistant Commissioner (Commercial Taxes), Warangal Division was fully justified in intimating and completing the proceedings under the A.P. GST Act even after it is repealed.

Having regard to the entire facts and circumstances and reasons stated above, I decline to invoke extra ordinary jurisdiction under Article 226 of the Constitution of India.

17. Sri M.A. Qadeer, learned senior Counsel for the respondents relied upon the decisions of this Court in Divisional Manager, New India Assurance Co. Ltd. Vs. Chanda Munda and Another, In that case the court considered the provisions of Section 14 of the U.P. Muslim Waqf Act, 1960 under which the Controller was said to have been appointed and also the provisions of Section 112 of the Waqf Act, 1995. It was held that there was no provision in the Act of 1995 corresponding Section 14 of the 1960 regarding the appointment of the Controller and consequently the appointment of the Controller under the repealed Act was not saved and automatically came to an end on 1.1.1996 when the Waqf Act 1995 came into force. The in decision Saltanat Begum's case undoubtedly supports the respondents but as the question about the effect of Section 112 has been decided at an earlier stage of his litigation in Writ Petition No. 23414 of 1998 and in Writ Petition No. 31182 of 2003 U.P. Sunni Central Waqf Board v. State of U.P. (supra) the latter which decisions was decided following the apex court decision in Gammon India Ltd. (supra) I would hold that the controller continued till a new Board was constituted under the 1995 Act. Moreover in paragraph 24 of the reports in Saltanat Begum's case this court has clarified that the observations made in the judgment on questions of fact and law involved in the case would not be treated as final. It was also observed that the observations made in proceedings relating to temporary orders whether made by the lower courts or by this court have no relevance in passing final verdict. Another decision relied upon upon by Sri M.A. Qadeer is U.P. Sunni Central Board Waqf v. 1st Additional District Judge, Jhansi and Ors. 2007 (1) A.R.C. 428. In that case the Waqf Board had sent a requisition to the Collector in respect of the property entered in the register of the Board. The Collector passed an order u/s 49-B(4) read with Section 57-A(2) of the U.P. Muslim Waqf Act for recovery of possession. A Misc. Civil Appeal was filed against the order of the Collector. The appeal was allowed. In the meanwhile Waqf Act 1995 was passed. It was held that the provisions of the two Acts were materially different and consequently the actions under the repealed Act were not saved u/s 112 of the waqf Act, 1995 the writ petition against the order of the Additional District Judge in the appeal had become infructuous. The decision is distinguishable for in that case the

proceedings had taken place under the repealed Act. In the present case the proceedings commenced on a complaint filed after the commencement of the Waqf Act 1995 and the proceedings would be referable to the new provisions irrespective of the provision that may have been referred to. Moreover so far as this case is concerned the point has been decided in Writ Petition No. 23414 of 1998.

18. It was submitted by Sri M.A. Qadeer that the tribunal did not apply mind to the requirement of Section 52 of holding inquiry after notice to the respondents. Section 52 of the Waqf Act, 1995 reads as follows;

52. Recovery of waqf property transferred in contravention of Section 51. (1) If the Board is satisfied, after making any inquiry in such manner as may be prescribed, that any immovable property of a waqf entered as such in the register of waqf maintained u/s 36, has been transferred without the previous sanction of the Board in contravention of the provisions of Section 51, it may send a requisition to the Collector within whose jurisdiction the property is situate to obtain and deliver possession of the property to it.

2. On receipt of a requisition under Sub-section (1), the Collector shall pass an order directing the person in possession of the property to deliver the property to the Board within a period of thirty days from the date of the service of the order.

3. Every order passed under Sub-section (2) shall be served-

(a) by giving or tendering the order, or by sending it by post to the person for whom it is intended; or

(b) if such person cannot be found, by affixing the order on some conspicuous part of his last known place of abode or business, or by giving or tendering the order to some adult male member or servant of his family or by causing it to be affixed on some conspicuous part of the property to which it relates:

Provided that where the person on whom the order is to be served is a minor, service upon his guardian or upon any adult male member or servant of his family shall be deemed to be the service upon the minor.

(4) Any person aggrieved by the order of the Collector under Sub-section (2) may, within a period of thirty days from the date of the service of the order, prefer an appeal to the Tribunal within whose jurisdiction the property is situate and the decision of the Tribunal on such appeal shall be final.

(5) Where an order passed under Sub-section (2) has not been complied with and the time for appealing against such order has expired without an appeal having been preferred or the appeal, if any, preferred within that time has been dismissed, the Collector shall obtain possession of the property in respect of which the order has been made, using such force, if any, as may be necessary for the purpose and deliver it to the Board.

(6) In exercising his functions under this section the Collector shall be guided by

such rules as may be provided by regulations.

19. The tribunal has held that before passing an order of requisition the Waqf Board is required to hold an inquiry which was not made and to be satisfied that the properties sought to be recovered are entered in the register of waqf and secondly that the transfer has been made without sanction of the Waqf Board. The view about effect for not holding enquiry appears to be erroneous in the facts of these cases. In the order of the controller dated 12.8.1997 reference has been made to the enquiry in which it was reported that the waqf is entered in the register at No. 1476 and that no permission before the transfer was applied for or taken. There is a specific finding of the Controller that no permission was taken. It was contended by Sri W.H. Khan that the fact that the waqf was registered has not been disputed in this case nor it has been disputed that there was no previous sanction of the Waqf Board before the sale deed. This contention appears to have merit. In the report of the Inspector on the basis of which the controller had passed the order it is stated that the waqf is registered as Waqf No. 1456. There is nothing to show that the recital is incorrect. The respondents have not set up any case that the waqf was not registered in the register of the waqfs. The respondents have also not set up any case that they had obtained previous sanction of the Waqf Board before the transfer. In these circumstances the order of the controller is not required to be quashed on the ground that no enquiry was conducted as required by Section 52 or that the Board has not applied mind regarding the respondent of Section 52.

20. It was also submitted by Sri W.H. Khan that the tribunal in an appeal against an order of the Collector cannot enter into the correctness of the order of requisition passed by the Waqf Board because what is challenged before the tribunal in the appeal is the order of the Collector. In *Narain Prasad Vs. Deputy Registrar, Co-operative Societies, Agra and others*, reliance was placed upon *Afzal Husain Vs. Ist Addl. District Judge and Others*, and it was held that the Collector was acting as an execution court and could not go behind the requisition and if the Collector's order, which is challenged suffers from no infirmity the appellate court cannot go into the correctness of the Board's order, the exceptions being where the order of the Board is a nullity or where the property is not entered in the register of Waqfs. In *Afzal Hussain's* case it was pointed out that exclusive jurisdiction has been carved out in favour of the Waqf Board and the tribunal in respect of matters, which can be decided and dealt with by the Board and the tribunal. The court hearing an appeal u/s 49-B(4) of the U.P. Muslim Waqf Act, 1960 is different from the tribunal constituted u/s 70 of the Act. The waqf could be registered u/s 29 of the Act and the entry made in the register maintained u/s 30 of the Act was consequential. The question of the validity of the registration of the waqf could not be examined before the appellate authority in the appeal u/s 49-B(4) of the Act. The effect of this decision is that the entry in the waqf register may not be open to question in an appeal against the Collector's order. However, even if the property is waqf property a person can acquire adverse possession over the waqf property as has

(sic) been held by the tribunal in this case. The question whether a person has acquired rights by adverse possession is not a matter which falls within the exclusive domain of the Waqf Board. The appeal against the order of the Collector under the Waqf Act, 1995 lies before the tribunal, which had wide powers and the question of adverse possession can be decided by the tribunal. In *Smt. Amina Khatoon v. Additional District Judge, Farrukhabad and Ors.* 1987 A.L.T. 1282 it was held by Hon"ble A.N. Verma, J. that the tribunal could go into the validity of the requisition order issued by the Board. The matter was writ large before the tribunal. It was held that the words used in Section 57-A(2) read with Section 49-B(4) are of wide amplitude not hedged in by any restrictive Clause and there is nothing in the scheme of the Act which may justify the conclusion that the District Judge is barred from examining the question whether the occupation of the person proceeded against by the Board u/s 57-A is lawful, that is, whether he has any right or title to remain in possession over the property. "It was further held that indeed there would be no point in providing for an appeal to the District Judge, which is a court of justice and law, if the only intention were to confer a limited power on the appellate court to examine whether a requisition has in fact been issued by the Board."

The decision in *Smt. Amina Khatoon's* case with which I am in respectfully agreement applies to these cases.

21. Section 52(2) of the Waqf Act, 1995 provides that the Collector shall give 30 days notice to the persons sought to be evicted to deliver possession to the Waqf Board. The tribunal however found that the respondents were given only seven days notice. It appears from the contention before the Tribunal and papers noticed by it that the Board had rectified the mistake by directing issuance of 30 days notice and on the request of Survey Commissioner regarding modification the Collector had put his signature but no change of the period of seven days was made in the notice, which was served upon the respondents. It is, however, not in dispute that no steps to recover possession from the respondents were taken by the Collector before the expiry of 30 days. The tribunal however has found the notice defective. That would not (sic) the requisition. In view of the order of the Waqf Board the 30 days notice be given it appears that the mistake in the notice was by oversight as the notice mentions that failing delivery of possession steps for eviction in accordance with Rule 7 of the U.P. Muslim Waqf Recovery of Property Rules would be taken. The collector (sic) the requisition and (sic). No prejudice has been caused to the respondents as no steps for their eviction were taken before the expiry of 30 days. In *Mahendra Pal Singh Vs. 2nd Addl. District Judge, Dehradun*, it has been held in interpreting Section 21(1)(a) of U.P. Act (sic) of 1972 which requires six months notice for eviction to be given before the filing of the application under that section that the want of notice of this duration would not affect the maintainability of the petition and the Prescribed Authority could hear the petition. It was held that the tenant had failed to show prejudice. On the facts of the present case it cannot be said that before steps for eviction were taken the 30 days notice was not given.

22. It was submitted by Sri M.A. Qadeer, learned senior Advocate that the report given by the Senior Inspector of Waqf was an ex parte report and that the respondents were not given any notice or opportunity by the Controller. The contention of the respondents' Counsel appears to be factually correct. However, all that the controller has found was that the property in question is waqf property and that the waqf is registered and that the transfer is invalid for want of permission. There appears no dispute on facts upon this point. The respondents had also filed appeal before the tribunal in which their case has been considered and the tribunal has allowed their appeal after full opportunity. No prejudice has been caused to the respondents especially when it has not been contended that the waqf was not registered or that the property was not waqf property or that permission was taken before the transfer. In Ashok Kumar Sonkar Vs. Union of India (UOI) and Others, which though was a service matter it has been held that violation of natural justice would not vitiate the order if the party is not prejudiced.

23. In view of my finding that the respondents had acquired title by adverse possession I find no merit in these revisions and they are dismissed.